



FH

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/155603

PRELIMINARY RECITALS

Pursuant to a petition filed February 19, 2014, under Wis. Admin. Code §DHS 10.55, to review a decision by the Milw Cty Dept Family Care - MCO in regard to Medical Assistance (MA), a telephonic hearing was held on April 17, 2014.

The issue for determination is whether the agency properly reduced petitioner's supportive home care (SHC) hours.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

I

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: La Teisha Prescott, RN, Life Navigators
Milw Cty Dept Family Care - MCO
901 N 9th St
Milwaukee, WI 53233

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County. Petitioner is a participant in the Family Care Program (FCP) and lives with his sister/guardian/caregiver and her family. Petitioner is diagnosed with Down's Syndrome, Developmental Disorder and high cholesterol.
2. On December 10, 2013 the petitioner's Family Care Interdisciplinary Team (IDT) completed a six-month review and assessment of petitioner's case, which included an assessment for SHC. At that review, a Case Manager (CM) and Registered Nurse (RN) interviewed petitioner's caregiver and petitioner in their home.
3. Based upon the review, petitioner's supportive home care hours were reduced from 28.5 hours to 16 hours per week. On December 11, 2013 the agency issued a notice to petitioner advising him of that reduction. Exhibit 1.
4. At some point thereafter, petitioner filed an appeal with the MCO Grievance and Appeal Committee, and a grievance hearing was held on January 29, 2014. On February 5, 2014 the agency issued a letter to petitioner advising him that the reduction of SHC was upheld.

DISCUSSION

The Family Care Program (FCP), which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. Whenever the local FCP decides that a person is ineligible for the program, or when the CMO discontinues an ongoing service in the service plan, the client is allowed to file a fair hearing request. Because a service reduction is sought here, the petitioner appropriately sought a fair hearing for a further, *de novo* review of the CMO decision. Wis. Admin. Code §DHS 10.55(1).

The state code language on the scope of permissible services for the FCP reads as follows:

DHS 10.41 Family care services. ...

(2) SERVICES. Services provided under the family care benefit shall be determined through individual assessment of enrollee needs and values and detailed in an individual service plan unique to each enrollee. As appropriate to its target population and as specified in the department's contract, each CMO shall have available at least the services and support items covered under the home and community-based waivers under 42 USC 1396n(c) and ss.46.275, 46.277 and 46.278, Stat., the long-term support services and support items under the state's plan for medical assistance. In addition, a CMO may provide other services that substitute for or augment the specified services if these services are cost-effective and meet the needs of enrollees as identified through the individual assessment and service plan.

Note: The services that typically will be required to be available include adaptive aids; adult day care; assessment and case planning; case management; communication aids and interpreter services; counseling and therapeutic resources; daily living skills training; day services and treatment; home health services; home modification; home delivered and congregate meal services; nursing services; nursing home services, including care in an intermediate care facility for the mentally retarded or in an institution for mental diseases; personal care services; personal emergency response system services; prevocational services; protective payment and guardianship services; residential services in an RCAC, CBRF or AFH; respite care; durable medical equipment and specialized medical supplies; outpatient speech; physical and occupational therapy; supported employment; supportive home care; transportation services; mental health and alcohol or other drug abuse services; and community support program services.

Wis. Admin. Code §DHS 10.41(2). Supportive home care services are included in the list of covered services in the statutory note above. The Department's 2013-14 CMO contracts may be viewed at <http://www.dhs.wisconsin.gov/lcicare/StateFedReqs/FC-RC-CMO-Contracts.htm>. Having established that SHC hours can be a covered service, the question that remains is, how many SHC hours are allowable?

The change in the reduction of SHC relates in large part to the time allotted for supervision. The IDT did not feel that petitioner was unsafe to be alone and unsupervised and discontinued those supervision hours. The IDT argues that supervision of the member when a family member is on the premises is generally not compensated unless the member needs a level of supervision *beyond stand-by supervision in case something occurs*. The IDT provided a copy of the Preferred Caregivers Guidelines that the IDT uses to assess individuals for SHC. See Exhibit 2. That guidance states that the CMO does not pay for family members to provide services that would normally be provided for as a matter of course in the usual relationship among members of a family. This includes routine laundry, meal preparation, shopping, usual cleaning, general/non-medical supervision, assisting with mobility, companionship and transportation/escorting. As a result, the agency reduced time during this assessment for meal preparation, shopping, and supervision. For the latter, the agency noted that petitioner was not an elopement risk, does not require hands on overnight care or supervision, and that he had no behaviors or medical conditions that require supervision. I add that the agency was aware that on the weekends petitioner may get dressed and head outside to the family van, however, they did not consider this a true elopement risk because he was acting under the routine of getting ready for his day program during the week and no real safety concerns were present about those actions.

It was only at the hearing that petitioner's caregiver/sister told the IDT that petitioner would be unsafe without all of the previously allotted time for SHC in this area of supervision. Petitioner's sister gave an example of how petitioner had wandered off while they were at the doctor's office in April 2014. I cannot find that the agency made an incorrect determination based on the information provided to it at the time of the assessment. The information at hearing by petitioner's sister *now* suggests that petitioner may be unsafe in his home because he may be an elopement risk. This information should be presented to the IDT through another assessment so that the IDT can truly understand and evaluate what services petitioner needs – whether it be additional SHC or new housing altogether to address the safety issues now suggested. Petitioner's sister/caregiver may request a new assessment for that purpose. I add, however, that additional SHC would not have helped the situation in the doctor's office as he was already under the supervision of his caregiver at that time.

The other areas in which the agency reduced SHC time were for grooming, meal preparation and grocery shopping. Petitioner had previously been awarded 25 minutes per week for nail clipping (grooming). Under the December assessment the agency awarded 10 minutes per week as that is the standard time allowed for such activities, and found the previous award of time excessive. Petitioner's sister argued at hearing that petitioner's nails are different due his Down's diagnosis and that accomplishing that task can be difficult depending on his mood. First, there is no evidence to suggest that petitioner's fingernails grow excessively as she claims. Rather, my cursory review of Down's and fingernails on the internet actually suggests that such individuals have short fingernails. Further, if his mood is such that he does not want to have his nails clipped (and I note there is no evidence of petitioner having behaviors that would complicate this task), this does not add to the time it task to accomplish this task - it just postpones it. As for meal prep, the agency allowed time for his sister to make his breakfast and lunch, but did not award time for dinner as this was considered a natural support under Preferred Caregivers Guidelines. I also find this reasonable under the guidelines. Finally, for grocery shopping the agency reduced the time by 30 minutes as this too was considered a natural support. Petitioner's sister testified that she has to shop separately for petitioner's groceries because of his lunch she prepares for his day program Monday-Friday. She also testified that because she eats fresh food she shops more frequently or when items are on sale that she wants to buy for herself. None of this credibly rebuts the agency's position. Petitioner does

not require any special foods, thus, when she grocery shops for whatever reason, there is no credible evidence to suggest that she cannot also shop for petitioner.

Based on the preponderance of the evidence, I conclude that the result of the SHC determination is justified and I do not find reason to increase the SHC hours beyond the 16 hours now approved. This is not to diminish the services petitioner's sister provides, however, under the guidelines here, I find the agency acted correctly.

I add, assuming petitioner finds this decision unfair, that it is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions.

CONCLUSIONS OF LAW

The agency properly reduced petitioner's SHC hours to 16 hours weekly.

THEREFORE, it is

ORDERED

That the petition for review herein be dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

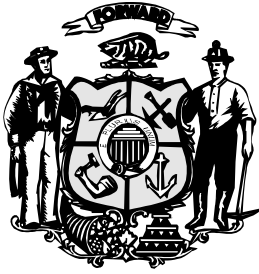
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 1st day of May, 2014

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on May 1, 2014.

Milw Cty Dept Family Care - MCO
Office of Family Care Expansion